90-1954 (2)

Supreme Court, U.S.
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No. 90-1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

2 TUDOR CITY PLACE ASSOCIATES AND
2 TUDOR GARDEN PARKING CORPORATION,

Petitioners,

– against –

2 TUDOR CITY TENANTS CORPORATION
KINNEY SYSTEMS, INC. AND
AMERICAN SAVINGS BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT 2 TUDOR CITY TENANTS CORPORATION'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari to review the decision of the Second Circuit Court of Appeals (which decision is in accordance with a prior seminal Second Circuit decision (West 14th Street Commercial Corp. v. 5 West 14th Owners Corp., 815 F.2d 188 (2d Cir. 1987), cert. denied, 484 U.S. 850 (1987) ("West 14th Street")) and numerous lower court decisions, holding that pursuant to the self-executing provisions of 15 U.S.C. §3607 ("§3607"), the garage lease at issue here was properly terminated, effective September 16, 1987?

2. Should this Court grant a writ of certiorari to review whether the holding of the Second Circuit Court of Appeals that the garage lease between the affiliate of the Sponsor (2 Tudor

City Parking Corp., "Parking Corp.") and the Cooperative Association (2 Tudor City Tenants Corp., "Tenants Corp."), pursuant to which the garage in the building (used by unit-owners who have a preference for garage spaces) is leased to the Sponsor's affiliate, who unilaterally controls and selects the garage operator, is a contract under §3607(a)(1) which "provides for operation, maintenance or management ... of property serving the ... unit owners"?

3. Should this court grant a writ of certiorari to determine whether §3607 should be amended judicially by interpretation, as petitioners' urge, to include a defense of "fairness," so that even where the criteria of §3607 are met, as here, the unit-owners should, nonetheless, be precluded from terminating a garage lease based on a

Sponsor's claim that it "is not fair" to terminate that garage lease, even when the garage lease was imposed by the Sponsor on the Cooperative Association for a term of 55 years (renewable "forever"), where the rents paid by the Sponsor's affiliate do not even cover total costs paid by the Cooperative Association's allocable to the garage (J.A. 956-957) and where the Sponsor at closing made a gross profit from the cooperative conversion of approximately $10,940,000, plus retained ownership of 124 occupied apartments?

4. Should this Court grant a writ of certiorari to review whether the application of §3607 violates the Fifth Amendment even though the garage lease was executed after the enactment of §3607, in accordance with a long line of Supreme Court cases holding that, "[l]aws and statutes in existence at the

time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein" (Opinion A-15)?

List of Parties and Rule 28.1 List

The parties to the proceeding in the Court whose judgment is sought to be reviewed are set forth in the caption of the case to this Court.

Respondent 2 Tudor City Tenants Corp. ("Tenants Corp.") has no parent company, subsidiaries or affiliates to list pursuant to Rule 28.1.

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RESPONDENT 2 TUDOR CITY TENANTS CORP.'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

The respondent 2 Tudor City Tenants Corp. (previously defined as "Tenants Corp") respectfully requests that this Court deny the petition for the issuance of a writ of certiorari to review the Opinion of the United States Court of Appeals for the Second Circuit in this case reported at 924 F.2d 1247 (2d Cir. 1991).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved, which are not part of the appendix to the petition are:

§3601: Congressional findings and purpose

a. The Congress finds and declares that:

1. there is a shortage of adequate and affordable housing throughout the Nation, especially

for low- and moderate-income and elderly and handicapped persons;

2. the number of conversions of rental housing to condominiums and cooperatives is accelerating, which in some communities may restrict the shelter options of low- and moderate-income and elderly and handicapped persons;

3. certain long-term leasing arrangements for recreation and other condominium- or cooperative-related facilities which have been used in the formation of cooperative and condominium projects may be unconstionable; in certain situations State governments are unable to provide appropriate relief; as a result of these leases, economic and social hardships may have been imposed upon cooperative and condominium owners, which may threaten the continued use and acceptability of these forms of ownership and interfere with the interstate sale of cooperatives and condominiums; apropriate relief from these abuses requires Federal action; and

4. there is a Federal involvement with the cooperative and condominium housing markets through the operation of Federal tax, housing, and community development laws, through the peration of federally chartered and insured financial institutions, and through other Federal activities; that the creation of many condominiums and cooperatives is undertaken by

entities operating on an interstate basis.

b. The purposes of this chapter are to seek to minimize the adverse impacts of condominium and cooperative conversions particularly on the housing opportunities of low- and moderate-income and elderly and handicapped persons, to assure fair and equitable principles are followed in the establishment of condominium and cooperative opportunities, and to provide appropriate relief where long-term leases of recreation and other cooperative- and condominium-related facilities are determined to be unconscionable.

§3603: Definitions

For the purpose of this chapter:

1. "affiliate of a developer" means any person who controls, is controlled by, or is under common control with a developer. A person "controls" a developer if the person:

a. is a general partner, officer, director, or employer of the developer,

b. directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 per centum of the voting interests of the developer,

c. Controls in any manner the election of a majority of the directors

of the developer, or

d. Has contributed more than 20 per centum of the capital of the developer. A person "is controlled by" a developer if the developer:

i) is a general partner, officer, director or employer of the person,

ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 per centum of the voting interests of the person,

iii) controls in any manner the election of a majority of the directors, or

iv) has contributed more than 20 per centum of the capital of the person.

* * *

(22) "Special developer control" means any right arising under State law, cooperative or condominium instruments, the association's bylaws, charter or articles of association or incorporation, or power of attorney or similar agreement, through which the developer may control or direct the unit owners' association or its executive board. A developer's right to exercise the voting share allocated to any condominium or cooperative unit which he owns is not deemed a right of special

developer control if the voting share allocated to that condominium or cooperative unit is the same voting share as would be allocated to the same condominium or cooperative unit were that unit owned by any other unit owner at that time.

§3614: Waiver of rights as void

Any condition, stipulation, or provision binding any person to waive compliance with any provisions of this chapter shall be void.

COUNTER-STATEMENT OF THE CASE

In 1981, petitioner 2 Tudor City Place Associates ("Associates"), a partnership, purchased 2 Tudor City Place (the "Building") which consists of a 330 unit residential complex and parking garage. In the same month, Associates incorporated 2 Tudor City Garden Parking Corp. ("Parking Corp."); its officers and directors consisted of the principals of Associates. Associates leased the garage in the Building to its shell

corporation, Parking Corp., which in turn subleased the garage to Corrao, the then garage operator. Garage space was leased to residents and non-residents with residents having a first priority as to vacancies. (See Certificate of Occupancy, A-10). The 1981 lease between Associates and Parking Corp. provided that if ownership of the garage changed, the new owners would replace Associates as lessor if the new owner assumed the covenants of the lease.

Associates' plan was to convert the Building to cooperative ownership. In August 1982, the principals of Associates incorporated Tenants Corp. Associates caused Tenants Corp. to enter into a pre-conversion contract with Associates whereby Associates sold the Building and parking garage to Tenants Corp. and transferred to Tenants Corp. its lease with Parking Corp. Under that

contract, until Associates sold the majority of shares in Tenants Corp., it had the unlimited power to alter the terms of the garage lease.

On November 5, 1982, Associates filed a preliminary prospectus pursuant to the New York General Business Law §352(eeee) (McKinneys 1984). On November 16, 1983, an Offering Plan (similar to a securities registration statement) was issued to sell the shares to tenants-in-occupancy and the public.

The Offering Plan (consisting of over 607 pages and four pre-closing amendments) disclosed, buried in numerous parts, that Associates caused Tenants Corp. to lease the parking garage to Parking Corp, that Tenants Corp. was responsible for major repairs, that the term of the lease was April 30, 2040 with the right to extend and that

the rent to Tenants Corp. was then $340,000 annually.

The Offering Plan did not disclose the market value of the garage lease and that the rent Parking Corp. would pay to Tenants Corp. would be substantially below market. The Offering Plan did not describe that Parking Corp. under the Kinney sublease would collect at a minimum $775,000 annually. The Offering Plan did not disclose that the garage rent to be paid would not even cover Tenants Corp.'s expenses allocable to garage operations. The Offering Plan misrepresented that "present and future rent payable by the tenant [Parking Corp.] is sufficient to cover to expenses fairly attributable to the garage space" (J-A 353, 512).

Associates caused two closings to be held, one on July 24, 1985, at which 106 out of 353 units were sold, and a second

closing on October 1, 1985, when 103 of the remaining units were sold. On July 24, 1985, the first closing, Associates caused Tenants Corp. to execute an Assignment and Assumption Agreement, whereby the rights and duties of Associates as landlord of the garage lease were transferred to Tenants Corp.

As the Second Circuit Court of Appeals noted:

> There is only one garage lease relevant to this case. That lease was originally executed by Associates, as lessor, and its related shell corporation, Parking. After the 1985 assignment and assumption, Tenants came to stand in Associates' place as lessor of the garage to Parking (A-6).

Based on a calculation of figures set forth in the Offering Plan, in July 1985, Associates' gross profit from this conversion was $10,940,000 plus the ownership of 124 apartments.[1/]

On October 30, 1985, an independent Board of Directors of Tenants Corp. was elected. On June 17, 1987, more than two-thirds of the unit owners voted to terminate the garage lease, pursuant to §3607. Notice of termination was sent to Associates and Parking Corp. providing that the Garage Lease was terminated effective September 16, 1987.

On August 13, 1987, Associates and Parking Corp. brought this action claiming that Tenants Corp.'s unit-

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1/ After the conversion was completed, Associates borrowed from American Savings Bank in excess of $3 Million with its unsold shares as security for the loan. Associates did not pay back its loan, and the lender foreclosed on its security. Associates, based on our information, has no further liability to the lender. Accordingly, its gross profit (conversion proceeds plus loan proceeds) was in excess of $13,940,000.

owners had no right to terminate the garage lease under §3607.

Upon cross-motion for summary judgment, Judge Griesa, United States District Court, Southern District of New York (A-17-39) granted petitioners' motion as to the §3607 claim and denied Tenants Corp.'s motion. The District Court granted Tenants Corp.'s motion for certification to the Second Circuit Court of Appeals under Fed. R. Civ. P. 54(b).

The Second Circuit Court of Appeals unanimously reversed the District Court, finding:

a. The garage lease was properly terminated effective September 16, 1987 (A-12, 13);

b. The statutory criteria of §3607 were properly met (A-8-10);

i. §3607 applies to this garage lease; a lease is a species of contract (A-9, 10);

ii. The Parking Garage " ... was property of the cooperative unit-owners" (A-10, 11);

iii. The contract was between Tenants Corp. and an affiliate of the Sponsor (A-10, 11);

iv. Tenants Corp. became a party to the contract on July 24, 1985 when it assigned the garage lease; on that date, Tenants Corp. was under "special developer control" since an independent Board of Directors was only

elected on October 30, 1985 (A-11);

v. The contract was for a term of more than three years (A-11);

vi. The contract termination was timely and within two years of the end of "Special Developer Control" (A-13).

c. The Second Circuit held that §3607 "facially is devoid of any disclosure defense," rejecting petitioners' contention in this regard (A-14). In addition, the Second Circuit Court of Appeals found that the purported disclosures buried in a 607 page Offering Plan were incomplete in that "they did not disclose the

disparity between the garage's market value and the rent Parking Corp. was to pay Tenants Corp. (A-14).

d. The Act does not violate the takings clause of the Fifth Amendment since the garage lease was executed after the Act was enacted (A-15).

1. Legislative Background

In 1980, Congress enacted the Federal Cooperative and Condominium Abuse Relief and Protection Act, 15 U.S.C. §3601, et. seq. ("the Abuse Relief Act"). The purpose of §3607 of the Abuse Relief Act was to provide tenant-shareholders with a method to terminate certain post-conversion sweetheart leases (as defined in that statute). The method provided was a

vote by unit owners to terminate such leases, followed by a notice of termination effective ninety days hence. Congress intended that process to be self-executing, without the need for judicial intervention -- and that is exactly what happened at 2 Tudor City Place; the unit-owners voted to terminate the garage lease between Tenants Corp. and Parking Corp. The Second Circuit Court of Appeals unanimously found that the garage lease was properly terminated under §3607.

By enacting §3607, Congress put all cooperative and condominium converters on notice that sweetheart leases may be subject to termination. After 1980, Associates, the sponsor here, had no reasonable expectation for future garage revenue in that §3607 was in full force and effect and unit-owners could exercise their Congressionally mandated

right to terminate the garage lease according to the procedures of §3607.

In enacting the Abuse Relief Act, Congress was cognizant that the imposition of long-term leases between the new cooperative or condominium entity and an affiliate of the Sponsor was a common practice in conversions.

Section 3601 of the Abuse Relief Act sets forth the Congressional findings and purpose behind the Abuse Relief Act, including an explicit finding that certain long-term leasing arrangements:

> which have been used in the formulation of cooperative and condominium projects may be unconscionable...as a result of these leases, economic and hardships may have been imposed upon cooperative and condominium owners, which may threaten the continued use and acceptability of these forms of ownership (15 U.S.C. §3601).

Congress intended that the §3607 termination be effective without resort to the judicial process. Senator

Williams, sponsor of the bill, stated:

> I am pleased to note that the Congress did retain a provision of the Senate bill which provides a federally-sanctioned, simple and non-judicial method by which the residents of a conversion project may void a long-term self-dealing leasing arrangement (S. Congressional Record -- Senate 13948 (September 30, 1980)).

Section 3607 of the Abuse Relief Act "provides a means by which the unit-owners of a conversion project may terminate a long-term, self-dealing contractual arrangement without having to resort to judicial action." S. Rep. No. 96-736, at 51.

The Abuse Relief Act contains two provisions relating to the long-term leasing practices; §§3607 and 3608. The self-executing procedures of §3607 apply to leases "entered into on or after October 8, 1980" (§3607(a)), the effective date of the Abuse Relief

Act. Those leases are subject to the self-executing procedure of §3607. §3608 applies to leases entered into prior to June 4, 1975, and provides a judicial method for providing remedial relief. The difference between the self-executing nature of §3607 and the judicial method set forth in §3608 reflects Congress's concern with applying the self-executing procedures set forth in §3607 retroactively to leases entered into prior to the enactment of the Abuse Relief Act.

§3607 of the Abuse Relief Act is in the nature of a consumer protection statute. The terms of the lease between Tenants Corp. and Parking Corp. are among the worst of its kind. The Garage Lease here is for a term of fifty-five years (renewable as long as the ground lease continues), the rent does not cover expenses such as real estate taxes

-- all expenses are borne by Tenants Corp. On the other hand, the Sponsor's affiliate reaps over $17 million of profit over the term of the lease (assuming rents at the level of the Kinney sub-lease) and performs no services.

In West 14th Street, the Second Circuit Court of Appeals noted, particularly, the problem of "hidden costs":

> Congress' desire to protect cooperative apartment owners in that it prevents the developers from offering the tenants a deceptively low purchase price financed by hidden costs spread over a number of years. Congress may have determined that even with effective representation in negotiations, tenants may still be unduly tempted by an artificially low insider purchase price to accepting hidden future costs. There may also have been concern that non-tenant buyers without representation by a tenants' organization might not be informed of concealed costs. (815 F.2d at 201)

Congress recognized that in the absense of federal legislation, there was no effective legal means for the cooperative and its unit-owners to remove the yoke of such long-term leases.[2/] The primary purpose of this legislation was to protect the unit-owners by a simple, self-executing remedy, based on objective criteria, which could easily and readily be understood and applied by lay persons, and which did not need judicial intervention for implementation.

2/ Cooperatives have attempted to rid themselves of such leases under various theories ranging from unconscionability to illegal tying arrangements under the antitrust laws. To the best of our knowledge to date, no such case has been successful. 305 East 24th Street Owners Corp. v. Parman, 714 F.Supp. 1296 (S.D.N.Y. 1989).

REASONS CERTIORARI SHOULD BE DENIED

Despite petitioner's efforts to create the illusion of unresolved issues, this case does not raise any issue appropriate for review by this Court.

First, the provisions of the Abuse Relief Act are clear on its face; the Second Circuit Court of Appeals has properly applied the statute to the facts here. §3607, the operative section, is written in simple and clear English, readily understandable. The Abuse Relief Act, and particularly §3607, has been twice interpreted by the Second Circuit Court of Appeals (West 14th Street and this case) -- the holdings sustain the right of unit-owners to terminate under §3607 a garage lease imposed by the Sponsor, such as the garage lease here. Numerous Southern District of New York decisions

and decisions by the New York State Appellate Division (the highest New York State Court to address this issue) are in accord.

This Court previously denied certiorari in West 14th Street, 484 U.S. 850 (1987). The petition for certiorari in West 14th Street raised many of the very same issues as are being alleged in this petition, including an argument similar to that made by petitioner that some of the provisions of §3608, which apply only to pre-1975 leases, should be grafted onto §3607.

Second, the Second Circuit decision in this case properly reflects and is in accord with the lower court decisions and implements the congressional purpose to protect unit-owners from the economic consequences of self-dealing leases.

Third, no constitutional issue is presented. Associates, the Sponsor,

bought the building after §3607 of the Abuse Relief Act was enacted; the garage lease between the Sponsor and its affiliate was executed a year after §3607 was enacted.

The Sponsor seeks review by this Court because the Sponsor simply does not like §3607 and the rights Congress afforded thereunder to unit-owners. All these issues raised in the petition have been categorically and properly rejected by the Second Circuit Court of Appeals and there is no reason for further review by this court.

2. §3607 is Clear and Understandable on its Face

The petition repeatedly refers to §3607 as "inept," "inartfully drafted," "incomprehensible" and "unfair," which is just not the case. The statute sets forth -- step by step -- the process by

which unit-owners may terminate leases such as the garage lease here. The definitional section of the Abuse Relief Act, §3603, which petitioners failed to set forth in their petition, defines the critical terms.

Petitioners' real complaint is that they do not like the Abuse Relief Act and the right granted to unit-owners to terminate the garage lease. However, Congress legislated this remedy to protect unit-owners from the financial impact of such leases.

In difficult economic times, as now, real estate taxes and fuel expenses rise, while unit-owners' personal income declines. The ability of unit-owners to meet maintenance increases (as well as to pay their own cooperative loans) is limited, especially when a portion of maintenance fees must be used to subsidize the Sponsor's profit under the

garage lease. Congress was rightfully concerned that these long-term leases would impose financial burdens on future unit-owners, which could jeopardize the ownership of their homes, and therefore, provided the termination remedy of §3607.

There is not a shred of evidence to support Petitioners' "statement" that because of the Tenants Corp./Parking Corp. Lease, the prices for the apartments were lower. The Offering Plan was silent in that regard. Petitioners' self-serving statements are pure speculation. Indeed, the price per share was the same from Black Book to Closing, but the terms of the garage lease became more favorable to the Sponsor. Moreover, many of the unit-owners who are now carrying the financial burden of this lease did not buy their apartments from the Sponsor.

but bought them from other tenants-shareholders at open market prices and did not receive this alleged benefit.

As the Second Circuit Court of Appeals so aptly noted:

> . . . it is unrealistic to expect prospective homeowners to understand all the financial data revealed in the offering materials. The average cooperative buyer is vulnerable to the practices of developers who may bury the hidden costs of self-dealing contracts in lengthy, legally-mandated disclosure documents. Indeed, in this case, Associates, disclosed the rent and long-term nature of the lease in the midst of its 607 Offering Plan. Yet, it did not disclose the disparity between the garage's market value and the rent Parking was to pay Tenants. The Offering Plan merely stated that 'Associates expected, to make a profit with respect to the Garage Lease in the future.' Only a legal or real estate expert could discern the possible extent of such profit. The amount of this profit would not become known to the typical purchaser of Tenants shares until Associates relinquished control of Tenants, and an independent

> board of directors was elected (A-14).

Congress recognized that during the conversion process, the Sponsor had the ability to establish an affiliate (as defined in §3603(1)) and impose on the cooperative a lease with that affiliate. The Sponsor's ability to impose such a lease is self-dealing in the most elementary sense. Frankly, petitioners' argument that this practice does not fall within §3607 is incomprehensible. According to petitioners, §3607 only applies when there is "divided control" and not when the sponsor has complete control. Control is control, whether it is 100% control or 51% control. As stated by the Second Circuit:

> Pre-conversion leases and contracts executed by the developer and its affiliates, such as tenant cooperatives with yet unsold shares, are self-dealing agreements. The

> developer stands on both sides of the bargaining table because it still controls its affiliate. Because the developer controls all parties at the pre-conversion stage, it can, as Associates did, enter into a self-dealing contract with an affiliate and then transfer its contractual obligations to a cooperative association (A-7).

Petitioners' repeated slurs -- calling Tenants Corp. and its unit-owners "unscrupulous" -- are unwarranted and are simply endemic of petitioners' desperation. Tenants Corp. and its unit-owners were exercising their Congressional given rights.

Similarly, petitioners' plea for the sympathy from the Court rings hollow. Petitioners could not have any reasonable basis to expect future garage revenues. From the date petitioners purchased the Building in 1981, §3607 was in full force and effect, and there was no rational basis for petitioners to

expect the continuation of those revenues in perpetuity.

Moreover, petitioners' purported reliance was at Tenants Corp.'s expense. Petitioners did not "keep" the ownership of the garage with all accompanying expenses. Here, Parking Corp. does not pay expenses such as real estate taxes; that burden and all other expenses are paid by the over 300 unit-owners of Tenants Corp., and are not fully covered by the amount of Parking Corp.'s rent payments.

Future garage revenues were only one aspect of petitioners' total profit picture. Based on the Offering Plan disclosures (J-A 107), the Sponsor's gross profits by July 1985 were approximately $10,940,000, plus the ownership of 124 occupied apartments. Subsequent gross profits were at a minimal an additional $3 million, for

total gross profits of $13,940,000. Certainly, the conversion was highly profitable -- even without the garage lease.

3. §3607 has been consistently interpreted by the Second Circuit, the Southern District of New York and New York State Courts

The two Second Circuit decisions (West 14th Street and 2 Tudor City) interpreted §3607 in accord with and to further the Congressional purpose to protect unit-owners. The Second Circuit both in this case and in the West 14th Street case has consistently applied §3607 to afford unit-owners with the self-executing right to terminate leases, such as the garage lease here. In the West 14th Street case, the Sponsor sought certiorari -- raising very similar issues to those being

raised here -- and this Court denied that petition for certiorari.

The Second Circuit's decision in West 14th Street that a lease is a contract -- which petitioners object to strongly -- is correct. As the Second Circuit Court of Appeals held in 2 Tudor City:

> There is no merit to this contention [that §3607 applies only to contracts, and a lease is not a contract]. Nothing in the extensive legislative history of the Act suggests that Congress meant to exclude leases from the term "contract" (A-8).

The lease was a contract which provided for the

> operation, maintenance and management of a garage which serv[ed] the . . . cooperative unit owners. 15 U.S.C. §3607(a)(1). As we recently held in West 14th Steet, §3607 covers leases as a species of "contract." 815 F.2d at 197-98.[3]

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[3] As noted in the West 14th Street (footnote continued)

In the three years since this Court's decision, numerous courts in this district have followed the West 14th Street decision and upheld §3607 terminations. A reversal would create havoc as to the orders issued in those cases.

The District Court decisions, many of which are unreported, are to our knowledge set forth below:

(1) 305 East 24th Street Owners Corp. v. Parman, 85 Civ. 388 (RW) (S.D.N.Y. 1987).

(2) 520 East 72nd Commercial Corp. v. 520 East 72nd Owners Corp., 691 F.Supp. 728 (S.D.N.Y. 1988).

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case:

> [A] line drawn between leases and contracts would exalt form over substance. Leases, a species of contract, may contain covenants tha require the lessee to perform certa contractual services for the landl

815 F.2d at 198.

(3) 181 East 73rd Street v. 181 East 73rd Street Tenants Corp., 87 Civ. 3362 (RO) (S.D.N.Y. 1988).

(4) Brabert Realty Co. v. 20125 Owners Corp., 703 F.Supp. 314 (S.D.N.Y. 1989).

(5) King v. 415 Second Owners Corp., 86 Civ. 4800 (MBM) (S.D.N.Y. 1987).

(6) Cromwell Associates v. Oliver Cromwell Owners, Inc., 705 F.Supp. 116 (S.D.N.Y. 1988).

(7) Coliseum Park Apartment Co. v. Coliseum Tenants Corp., 742 F.Supp. 128 (S.D.N.Y. 1990).

(8) 200 East 84th Street Owners Corp. v. Salomone, 89 Civ. 5035 (S.D.N.Y. 1989).

(9) Park South Tenants Corp. v. 200 Central Park South, 748 F.Supp. 208 (S.D.N.Y. 1990)

(10) Park South Tenants Corp. v. 200 Central Park South, 754 F.Supp. 352 (S.D.N.Y. 1991)

Several New York cases are in accord with and follow the federal decisions:

(1) Phoenix Tenants Ass'n. v. 6465 Realty Co., 500 N.Y.S.2d 657 (1st Dept. 1986), requiring sponsors to disclose to tenants their rights under §3607.

(2) 233 East 86th Street Corp. v. Park East Apartments, Inc., 131 Misc.2d 242, 499 N.Y.S.2d 853 (N.Y.Co. 1986).

Only one New York City landlord-tenant judge in dicta has stated that he would not follow the Second Circuit's holding in West 14th Street that a lease was a contract, although he would and did follow the West 14th Street case to hold that §3607 does not apply to a commercial lease. Park East Apartments, Inc. v. 233 East 86th Street Corp., 139 Misc.2d 806, 529 N.Y.S.2d 674 (Civil Ct. Cty. of New York, 1988), affd., on other grounds, 143 Misc.2d 60 (App. Term, 1st Dept. 1989). Petitioners ask this Court to grant certiorari because the reasoning of that landlord-tenant judge "is correct," but that the Second Circuit Court of Appeals in its two decisions and various District Court decisions were "incorrect," and that

those Circuit Court and District Court judges do not understand §3607. There is no reason for this Court to review the holdings of the Second Circuit. The intellect and clarity of those holdings speak for themselves. There is no conflict between the federal decisions and the New York State decision -- even the holding of the landlord-tenant judge comports with the West 14th Street holding.

4. §3607 is constitutional

§3607 only applies to leases executed after the enactment of the Abuse Relief Act in 1980. Thus, it cannot interfere with any investment backed expectations because those expectations necessarily included the possibility of unilateral early termination by the unit-owners pursuant to the Abuse Relief Act. See Penn Central Transportation Co. v. City of

New York, 438 U.S. 104 (1978). See also S&D Service Inc. v. 915-925 West Schubert Condominium Association, 132 Ill. App.3d 1019, 478 N.E.2d 478 (2d Div. 1985). Based on the rights afforded to the unit-owners by §3607, contrary to petitioners' contentions, the unit-owners did not "understand" that the anticipated profit "belonged" to petitioners. To the contrary, the unit-owners "understood" that §3607 permitted the termination of the lease; petitioners similiarly understood that the lease was subject to the possibility of termination.

Petitioners had the ability to structure the conversion to avoid §3607. See Colonial Penn Insurance Co. v. Heckler, 721 F.2d 431 (3rd Cir. 1983) where the Third Circuit did not find a regulation that affected pre-existing contracts unconstitutional because,

among other things, the company knew of the imminent congressional action "well in advance" of the effective date of the regulations and, thus, had time to make the necessary adjustments. For example, Associates could have entered into a lease with a non-affiliate, and avoid the application of §3607.

Nor is there a due process violation. Where a contract comes into existence after the effective date of the statute, there is no entitlement to those rights previously limited by statute, and thus, procedural due process is not implicated.[4/] See Board

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[4/] Notwithstanding petitioners' lack of entitlement to notice, they, in fact, did receive notice of the meeting where the vote to terminate the garage lease was presented. Indeed, Mr. Nathan Dershowitz, petitioners' counsel and a tenant-shareholder of Tenants Corp., not only attended the meeting, but presented arguments against the vote to terminate.

of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); reh. den., 439 U.S. 883 (1978). These constitutional issues have been resolved specifically with regard to §3607 in the decision below (A-15). See also, West 14th Street; supra, 305 East 24th Street Owners Corp. v. Parman, 85 Civ. 388 (RJW) (S.D.N.Y., April 28, 1987).

CONCLUSION

No serious question warranting review by this Court has been presented. The mere fact that petitioners do not like the effect of §3607 does not warrant review by this Court. Congress has determined to legislate cooperative conversions and to protect unit-owners from such onerous leases as the garage lease here. The Second Circuit Court of Appeals followed the Congressional mandate and properly-

interpreted §3607, and applied it to the facts herein in accordance with the language of the statute and existing case law.

Respectfully submitted,

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